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No. 78-1161

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS M. HAAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 583 F. 2d 216. The opinion of the district court (Pet. App. 13a-29a) is reported at 440 F. Supp. 426.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1978, and a petition for rehearing was denied on December 26, 1978 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on January 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment in this case, which alleges that petitioner corruptly endeavored to impede and

influence a grand juror in the discharge of her duty, is sufficient to state an offense under 18 U.S.C. 1503.

2. Whether the indictment in this case adequately informs petitioner of the charge against him.

STATEMENT

In October 1976, officials of the Mobile County Sheriff's Department allegedly learned that inmates at the Mobile County Jail were planning to escape by digging a hole through the north wall of the jail. Rather than prevent the escape attempt, the officials allegedly agreed to allow it to proceed so that the inmates could be ambushed and shot as they tried to flee. The attempted escape occurred on October 12, 1976; in the course of it, inmate Louis Wallace was shot to death.

A grand jury of the United States District Court for the Southern District of Alabama was empaneled to investigate this incident.[1] In March 1977, petitioner, a Mobile attorney representing a target of the investigation, allegedly contacted grand juror Sandra Haas and attempted to influence her to vote against indictments in the jail escape case. Based on this incident, petitioner was indicted for obstruction of justice, in violation of 18 U.S.C. 1503. The indictment charged that petitioner "corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury * * * considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by

[1]On June 27, 1977, the grand jury indicted nine officials of the Sheriff's Department for conspiracy to violate the rights of citizens, in violation of 18 U.S.C. 241. The district court dismissed the indictment on the ground that it failed to state an offense (*United States* v. *Purvis*, 436 F. Supp. 770 (S.D. Ala. 1977)), but the court of appeals reversed (580 F. 2d 853 (5th Cir. 1978)), and this Court denied certiorari (No. 78-962, cert. denied, Feb. 21, 1979).

the Grand Jury in an effort to influence and impede [her] in the discharge of her duty as a Grand Juror * * *" (Pet. App. 16a).[2]

Petitioner moved to dismiss the indictment, contending that it failed to state an offense because it did not allege knowledge and intent and that it failed to state sufficient factual data to allow him to prepare a defense (see Pet. App. 13a-14a). The district court granted the motion on September 12, 1977. Although the court acknowledged that the indictment followed the language of the statute, it concluded that the charge was nonetheless deficient because it did not contain an express allegation of the "essential elements of knowledge and intent" (Pet. App. 28a-29a).

The government appealed and the court of appeals reversed. The court of appeals held that the allegation in the indictment that petitioner "corruptly did endeavor" to influence a member of the grand jury, when read in conjunction with the allegation that petitioner committed a deliberate and knowing act "in an effort to influence and impede" the grand juror, adequately charged "an exertion toward an unlawful purpose" (Pet. App. 6a). The court also held that the factual averments in the indictment were sufficient to withstand a motion to dismiss on the grounds of vagueness and that a bill of particulars was the appropriate remedy for petitioner to obtain more detailed information about the charge (*id.* at 9a-10a).

[2]18 U.S.C. 1503 provides in pertinent part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * or any grand or petit juror * * * in the discharge of his duty * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

ARGUMENT

1. Petitioner challenges the court of appeals' judgment reinstating his indictment. The decision places petitioner in the same position as if the district court had denied his motion to dismiss. That ruling could not have been challenged by a pretrial appeal (see *United States* v. *MacDonald*, 435 U.S. 850 (1978)), and the same considerations that counsel against permitting interlocutory appeals of such orders weigh against this Court's undertaking to review the adequacy of the indictment at this stage of the proceedings. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). At trial petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all of his contentions to this Court by seeking review of the final judgment.[3]

2. In any event, petitioner's claims regarding the inadequacy of the indictment are without merit for the

[3]Although petitioner contends (Pet. 15) that the indictment fails to provide sufficient notice of the charges to allow him to prepare for trial, the court of appeals indicated that it would be appropriate for the district court, on remand, to grant petitioner's motion for a bill of particulars (Pet. App. 9a-10a). As petitioner correctly notes (Pet. 14), a bill of particulars cannot cure a defective indictment. He fails to realize, however, that an indictment sufficiently specific to satisfy the constitutional due process standard may supply insufficient information to permit a defendant to prepare an adequate defense. The remedy in that situation is a bill of particulars. See *United States* v. *Cantu*, 557 F. 2d 1173, 1178 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *United States* v. *Birmley*, 529 F. 2d 103, 108 (6th Cir. 1976); *United States* v. *Salazar*, 485 F. 2d 1272, 1277-1278 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974); *United States* v. *Leach*, 427 F. 2d 1107, 1110 (1st Cir.) cert. denied, 400 U.S. 829 (1970). That remedy would be essentially meaningless if the "apprisal" function served by the bill was considered to be identical to the "apprisal" necessary for a constitutionally valid indictment. We note that petitioner moved for a bill of particulars at the time he sought dismissal of the indictment (Pet. App. 3a).

reasons stated by the court of appeals, upon whose opinion we rely.[4] Although the indictment in the case, which tracks the statutory language (see *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974)), does not allege that petitioner acted "willfully" or "knowingly," it does charge that he made a "corrupt endeavor" to influence the grand jury. The term "corruptly" means "for an evil purpose" and, when combined with the word "endeavor," describes an act done with knowledge and mens rea (Pet. App. 6a). See, *e.g.*, *United States* v. *Fasolino*, 586 F. 2d 939, 941 (2d Cir. 1978); *United States* v. *Partin*, 552 F. 2d 621, 642 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *United States* v. *Ryan*, 455 F. 2d 728, 734 (9th Cir. 1972); *Seawright* v. *United States*, 224 F. 2d 482, 483 (6th Cir.), cert. denied, 350 U.S. 838 (1955); *Martin* v. *United States*, 166 F. 2d 76, 79 (4th Cir. 1948); *United States* v. *Zolli*, 51 F.R.D. 522, 526 (E.D. N.Y. 1970).

Moreover, the indictment explicitly alleges that petitioner knew that Sandra Haas was a member of the grand jury investigating Wallace's death and that he communicated information to her "in an effort to influence and impede" her in the exercise of her duty in connection with that matter (Pet. App. 6a-7a).[5] Whether petitioner in fact acted with the requisite intent is, of course, a question for the jury. *United States* v. *Fasolino, supra*, 586 F. 2d at 941. But the indictment leaves no

[4]Contrary to petitioner's contention that the court of appeals failed to appreciate the constitutional (as opposed to "technical") dimension of his challenges to the indictment (Pet. 6, 15-16), the court below explicitly acknowledged that the test of an adequate indictment is "whether it conforms to minimal constitutional standards" (Pet. App. 4a).

[5]Petitioner is therefore incorrect in his assertion (Pet. 10) that the court of appeals found both knowledge and intent implicit in the indictment's use of the statutory language alone.

doubt that willfulness and intent must be proven at trial[6] and that a conviction cannot be based on innocent or inadvertent conduct. "The plain and sensible meaning of the language used fairly charges an exertion toward an unlawful purpose" (Pet. App. 6a). See *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927).

3. Petitioner's second contention, that omission of details of the information he allegedly conveyed to Sandra Haas renders the indictment fatally defective (Pet. 12-15), is equally insubstantial. As the court of appeals noted (Pet. App. 8a-9a), the "indictment does contain the basic facts necessary to apprise the defendant of the charge and to prevent double jeopardy. It states the name of the grand juror and the Grand Jury, specifies the matter before the Grand Jury, relates the information communicated to that subject matter, and sets forth the means of communication." In the unlikely event of a subsequent indictment based upon the same criminal act, petitioner could rely upon the entire record and even parol evidence to avoid double jeopardy. See *Russell* v. *United States*, 369 U.S. 749, 764 (1962); *Bartell* v. *United States*, 227 U.S. 427, 433 (1913).

Petitioner seeks support for his position (Pet. 13) in *Russell* v. *United States, supra*, but the omission from the indictment in *Russell* concerned the subject matter of the congressional inquiry to which the defendants' unanswered questions were allegedly "pertinent" (369 U.S. at 752).[7] Similarly, in *Van Liew* v. *United States*, 321 F. 2d 664 (5th Cir. 1963), the defendants were prosecuted under

[6]As the court of appeals observed (Pet. App. 5a), "[b]oth parties agree that whether knowledge and intent are necessary to sustain a conviction is not at issue. It is settled that these two elements are necessary ingredients of an offense under this statute."

[7]Pertinence was an element of the offense charged in *Russell*. See *Hamling* v. *United States, supra*, 418 U.S. at 118.

an indictment that failed to specify the particular way in which a complex economic statute prohibiting "adulteration" of foods offered for sale in commerce had been violated. *Id.* at 670-674. By contrast, the indictment in this case specifically identifies the subject matter under grand jury consideration with respect to which petitioner allegedly endeavored to influence and impede the grand juror.

Petitioner's indictment expressly identifies the portion of Section 1503 alleged to have been violated and "adequately relate[s] [petitioner's] actions to the statute." *Van Liew* v. *United States, supra*, 321 F. 2d at 674. See *United States* v. *Clark*, 546 F. 2d 1130, 1134-1135 (5th Cir. 1977) (distinguishing *Van Liew*). The indictment clearly charges petitioner with a corrupt endeavor to obstruct justice by influencing and impeding a grand juror. The content of the telephone communication from petitioner to Sandra Haas is an evidentiary detail, not an essential element of the crime. While it may well be important to petitioner's defense for him to know prior to trial exactly what the government intends to prove that he said to the grand juror, this information can be requested in a motion for a bill of particulars.[8]

[8]Indeed, the Fifth Circuit emphasized in *Van Liew* (321 F. 2d at 670) that a defendant's "constitutional right to know what *offense* is charged" should not be confused with "his need to know the *evidentiary details* establishing the facts of such offense. As to the latter, the remedy lies in the Motion for Bill of Particulars * * *" (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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